Statement

REMARKS OF

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FOR A LUNCHEON ADDRESS

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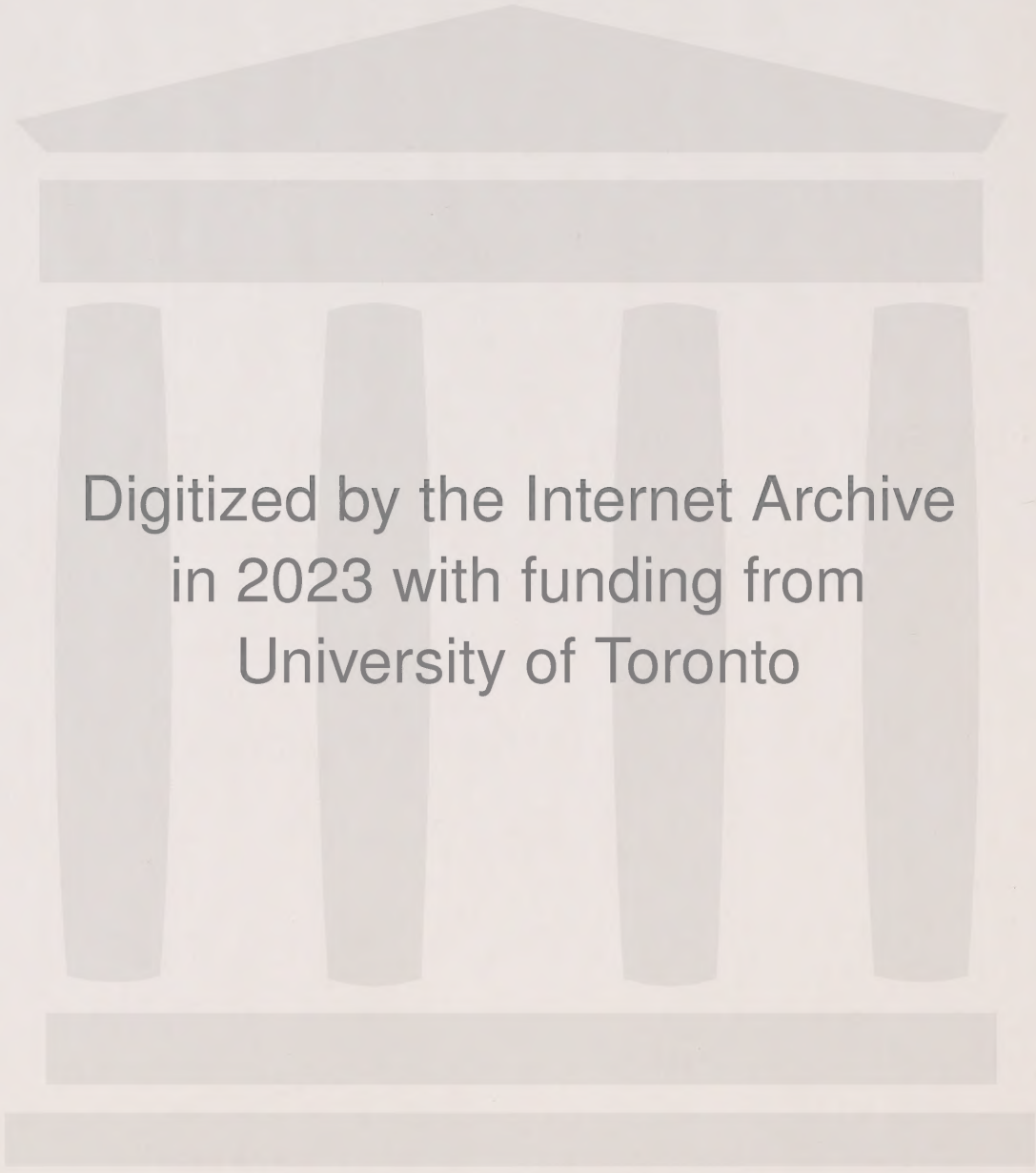

Introduction

Let me begin by saying that I am glad to have this opportunity to address the Canadian Manufacturers' Association's (CMA) Legislative Committee. I know you are particularly interested in what we are considering by way of amendments to the *Competition Act* and I will say more about this in a moment. However, I thought it would be useful to cover a number of topics in which the CMA has had, or can have, a role in the policy development of the Bureau of Competition Policy. I'll be discussing strategic alliances, corporate compliance programs, confidentiality and international cooperation and, finally, amendments.

Strategic Alliances

With the process of globalization, businesses are operating in markets that are becoming less protected, less regulated and geographically much larger. Businesses are continually being challenged to address new market demands and opportunities, and to take every available advantage to be able to compete effectively. Global restructuring has resulted in Canadian and international companies establishing strategic alliances, and other types of cooperative arrangements, with other companies, both in Canada and in other countries.

Strategic alliances achieve a variety of goals. They can:

- facilitate technological synergy;
- permit the sharing of product-development costs and risks; and
- facilitate access to parties' markets.

Alliances can take the form of informal agreements or, at the other extreme, the full integration or merging of the firms involved. They can involve vertical arrangements between suppliers and their customers, as well as horizontal arrangements between corporations in roughly the same line of business.

The vast majority of strategic alliances do not raise significant competition policy concerns. Many can be of substantial assistance in providing real value to consumers, as well as improving Canadian business' competitiveness. They often lead to positive innovation and efficiency gains without any negative effects on competition.

Parties, in planning and implementing such alliances, must be able to determine whether the *Act* has been co ntravened. If there is uncertainty regarding the legality of strategic alliances, there is a risk that alliances that are beneficial for competition and the efficiency of the economy may not be pursued. Because I was concerned that this might be happening, on September 12, 1994, I issued a draft policy

statement to clarify my enforcement approach and provide general guidance on the application of the *Competition Act* to strategic alliances and invited comments.

The comments from the CMA were an invaluable guide to revising the Bulletin. In particular, the Bulletin's discussion of the conspiracy provision, section 45, was observed by the CMA to be "so strong that the comforting parts of the document are overshadowed." "[T]he draft Bulletin tends to discourage rather than support the formation of pro-competitive arrangements." It is indeed ironic that the very instrument issued in an effort to reduce a perceived chill in the marketplace over forming strategic alliances was considered to have the potential to exacerbate the problem.

Nevertheless, a wide range of legal, business and government commentators have found value in the idea of a Bulletin because they believe that there is at least a perception that competition policy concerns may inadvertently thwart the formation of efficiency-enhancing alliances. Accordingly, we are proceeding to finalize the Bulletin.

I recently sent a revised Bulletin to the CMA for review and comment. We have attempted to respond to several of the concerns raised. First and foremost, it is more positive in tone, incorporating additional case scenarios which illustrate the procompetitive or competitively neutral features of many alliances. Second, we have revisited our discussion of when an alliance is likely to be reviewed under the conspiracy provision, section 45, as opposed to section 92, the merger

provision, which we hope will reduce some of the earlier uncertainty in this area. Third, we have expanded the discussion of when information-sharing among competitors may trigger a conspiracy inquiry. Finally, we have also indicated more clearly the infrequency with which we believe the conspiracy provisions will apply to strategic alliances.

Corporate Compliance Programs

I'd like to turn now to discuss, briefly, corporate compliance programs -- an area where you can have a significant role.

Ten years ago, Canadian companies with a competition law compliance program were rare. Today, businesses are becoming increasingly aware that a thorough knowledge of the application of competition law to their activities, through effective compliance programs, is necessary for them to compete successfully in the global marketplace. In my view, this is a direct result of the ongoing dialogue and partnership between the legal and business communities and the Bureau.

Our goals in enforcing the law and educating businesses on its requirements, and those goals that motivate businesses to implement compliance programs, are similar in at least two ways. First, they both aim to deter and, one hopes, prevent violations of the *Act*. Second, they aim to educate, so that businesses are not constrained in their ability to compete

effectively by ignorance or uncertainty as to the rules of the game.

I believe that the Bureau can assist companies in developing, implementing and operating effective compliance programs. One of my priorities is to communicate my views on the key features of compliance audits and internal compliance programs that I consider to be relevant enforcement considerations. Later this year, I will be issuing a draft bulletin on the subject, for consultation purposes. As a major stakeholder, any views the CMA may wish to provide will be welcome.

In my view, a good corporate compliance program includes a number of characteristics:

- it is available in clear, written form;
- it involves ongoing commitment to employee education, with appropriate modifications depending on which employees are being targeted;
- there is a highly visible level of participation and buy-in by senior management, so that employees will take the program seriously;
- an audit or review mechanism exists to ensure and encourage compliance;

- avenues are available to employees to report and/or discuss possible violations; and

- one or more persons are charged with responsibility for the program and for ensuring that it is kept current, reflecting evolving jurisprudence as well as current enforcement policies.

On the last point, the Bureau can be a valuable resource to a company's compliance program, through the many publications -- enforcement guidelines, bulletins, pamphlets and other media -- available. As well, we welcome invitations to address groups, small and large.

The details of what my policy on compliance programs will be in terms of their impact on how I exercise my enforcement discretion will be set out in the forthcoming bulletin. Today, I want to mention a number of reasons why you should consider recommending the implementation of such a program:

- the prevention of illegal conduct -- particularly since corporate liability can be generated by an individual when performing unlawful acts within the area of corporate operations assigned to that individual;

- the consequences that flow from the investigation and prosecution of anticompetitive practices -- penalties for corporations and individuals, the cost of litigation, the

adverse publicity, exposure to private civil actions and the burden of complying with a prohibition order; and

- a lack of a clear understanding of the provisions of the *Act* creates uncertainty and can inhibit corporate officials from engaging in conduct that might be legal and advantageous to the company from a business standpoint. A good corporate compliance program can help to identify the boundaries of permissible conduct, as well as signal the zones of risk where it might be advisable to seek legal advice.

Clearly, a compliance program can benefit from input from both in-house counsel and outside counsel specializing in competition law. In-house counsel are crucial to the success of any compliance program, being uniquely placed to ensure it is suited to the particular needs and circumstances of their company. As well, they can ensure that the right people are identified for key roles in the program. Finally, they can be actively involved in the audit function and in ensuring that the program is reviewed and updated on a regular basis, most likely in consultation with outside counsel.

Confidentiality and International Cooperation

As business activity globalizes, the Canadian economy becomes increasingly susceptible to anticompetitive practices occurring outside our borders. Like other antitrust agencies around the world, the Bureau is addressing this challenge. Effective information-sharing is one important tool assisting us

in our efforts to combat anticompetitive practices that transcend borders, harming Canadians -- whether it's price fixing or deceptive telemarketing. Canadian consumers and businesses are, after all, the ultimate beneficiaries of a competitive marketplace.

In the recent past, I have often spoken of the need for greater international cooperation to combat anti-competitive activity effectively. The *Competition Act* is a key component of the framework legislation that fosters a dynamic market economy for businesses operating in Canada. In the new global economy, antitrust agencies and competition authorities are going to be pursuing more and more cases where cooperation and coordination will be necessary to ensure healthy and competitive markets. We are currently pursuing joint investigations with agencies on a number of matters. The value of such cooperation was clearly demonstrated last year in the resolution of the fax paper cases in Canada and the United States.

It should come as no surprise that mutual legal assistance takes place between foreign antitrust agencies. The detection and prosecution of restraints can, after all, be difficult because of their covert nature. As a result, we use every legal means available to us to address anti-competitive acts, including mutual legal assistance treaties. The importance of this subject was recently recognized in the United States where, this past autumn, the *International Antitrust Enforcement Assistance Act* was enacted. This legislation allows the United States government to negotiate reciprocal

agreements with other countries to enhance enforcement assistance and information-sharing in both criminal and civil matters. I welcome this development.

One of my top priorities has been to expand enforcement cooperation between agencies. Last July, I issued a draft Bulletin for consultation purposes that set out how the Bureau treats the information it acquires in enforcing and administering the *Act*. The Bureau is committed to treating such information responsibly, and has always maintained constant vigilance to avoid, to the greatest extent possible, communicating confidential information while conducting investigations.

Central to that draft policy was the position taken that the "administration or enforcement" exception to the prohibition against communicating section 29 information (the only type of information explicitly protected under the *Act*) permits communication for the purposes of advancing a specific investigation being carried out pursuant to one or more sections of the *Act*. Communicating such information to a foreign antitrust agency, where the proposed communication is to receive the assistance of that agency regarding a Canadian investigation, falls within this exception as well.

We expect to finalize our policy in this area in the near future. Although the CMA did not comment on the document, some of you may know that the positions taken in the draft Bulletin have been characterized by some as an "aggressive"

interpretation of the law. I hope to report back to interested parties in the near future on how we balance the concerns about confidentiality with the need to enhance international cooperation.

Amendments

In a luncheon address to the Canadian Bar Association, Competition Law Section, in Montreal, Quebec, on September 30, 1994, I stated that the Minister of Industry, the Honourable John Manley, had asked me if I was satisfied with the *Act*. In a recent newspaper interview, he indicated that a review of the *Act* may be warranted.

It is my view that, for the most part, the *Act* is working well and substantial reform is not required. Nevertheless, while the basic rules of the game do not need revision, as a consequence of nearly a decade of experience in its application, as well as changes in the enforcement environment, there are a few key areas where improvements could be introduced.

For example, one option relates to the filing requirements for merger prenotifications. The current prenotification requirements could benefit from fine-tuning. The information requirements could be revised to meet the assessment needs of the Bureau better, while reducing the paper burden for businesses. There is also the question of whether exemptions for certain classes of transactions which rarely raise competition issues would be desirable.

While it is too early to say what elements might form part of a package of amendments, I can provide a preliminary indication of the direction in which potential amendments could be headed. The impetus for amendments comes from:

- the government's Program Review, which is pressing all of us in the public sector to increase administrative effectiveness and efficiency and reduce the paper burden on business;
- the globalization of business, which has heightened the need for cooperation among investigative agencies and raised confidentiality concerns for business;
- repeated calls for reform to the adjudication of the misleading advertising and deceptive marketing practices provisions; and
- the proliferation of deceptive telemarketing practices, together with related difficulties of detecting and addressing them.

Having regard to the above guiding principles, potential amendment items will likely fall into one of two categories: "core" items and "desirable" items. Core items might be characterized as those essential to the continued effective administration and enforcement of the *Act* or those with widespread support from stakeholders. Desirable items would be welcome amendments, but only if they have broad support. It is in no one's interest to become embroiled in

protracted debate over amendments for which there is not broad consensus and where the benefits to the private sector and the government are marginal.

The CMA, representing significant stakeholders in the Canadian business community, will have an important role to play in the coming discussion on amendments. Indeed, it has already had a significant role in shaping the direction in which we are headed concerning the misleading advertising provisions, by virtue of its representation on a Working Group established in 1990.

For those of you unfamiliar with it, the unanimous report produced by the Ratushny Working Group on misleading advertising included the following recommendations:

- the establishment of a non-criminal adjudication alternative, to be conducted by a single judicial member of the Competition Tribunal;

- more appropriate remedies available to the Tribunal, including "cease and desist" orders, restitution orders, orders directing payments towards consumer education and the publication of information notices;

- the establishment of a reference hearing process which could provide "generic", rather than "case-by-case", decision-making, where there are broad issues to be addressed which transcend individual cases; and

- that the Director be authorized to obtain assurances of voluntary compliance, enforceable as consent orders when filed with the Tribunal.

Since the Ratushny Report was submitted, the Bureau has been engaged in an ongoing review of its recommendations, studying their feasibility and ramifications were we to seek to implement them through legislation.

To gear up for the amendments process ahead, I have created a small Amendments Unit, headed by Harry Chandler, who some of you will have met when he was Deputy Director of Investigation and Research of the Criminal Matters Branch. I am confident that this unit is well-placed to see that this initiative proceeds speedily to a successful conclusion. The CMA's advice will be actively sought.

Conclusion

Today, there are a significant number of issues in which the Canadian Manufacturers' Association has had, or will have, an important policy development role -- strategic alliances, corporate compliance programs, confidentiality and international cooperation and amendments. I urge you to remain involved and to have regard not merely to domestic issues but also the broader global environment, which will be key to your companies', and this country's, future economic success.

Thank you.